

US EPA ARCHIVE DOCUMENT

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 11-1184

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P.
JACKSON, Administrator,

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

FINAL BRIEF FOR RESPONDENTS

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RESPONDENTS' CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 27(a)(4), counsel for Respondents United States Environmental Protection Agency and Lisa Jackson, Administrator (collectively “EPA”) submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to These Cases

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Sierra Club.

(B) Rulings Under Review

The EPA action under review is “Completion of the Requirement to Promulgate Emission Standards,” 76 Fed. Reg. 15,308 (Mar. 21, 2011).

(C) Related Cases

The case on review has not been previously before this Court or any other Court. EPA is not aware of any related cases.

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
CO	Carbon Monoxide
EPA	United States Environmental Protection Agency
GACT	Generally Available Control Technology
HAP	Hazardous Air Pollutant
HCB	Hexachlorobenzene
HMIWI	Hospital/Medical/Infectious Waste Incinerators
MACT	Maximum Achievable Control Technology
MWC	Municipal Waste Combustion
PCB	Polychlorinated Biphenyls
PM	Particulate Matter
POM	Polycyclic Organic Matter
THC	Total Hydrocarbon

JURISDICTION

Petitioner Sierra Club challenges a notice issued by Respondent the U.S. Environmental Protection Agency (“EPA” or “Agency”), entitled “Completion of the Requirement to Promulgate Emission Standards,” and published at 76 Fed. Reg. 15,308 (Mar. 21, 2011) (“90 Percent Notice” or “Notice”). EPA does not contest the finality of the Notice, in accordance with the Agency’s statement in *Sierra Club v. Jackson*, No. 01-1537 (D.D.C.), that the Notice is a final agency action subject to judicial review pursuant to 42 U.S.C. § 7607(b)(1). *See infra* at 13. EPA does dispute Petitioner’s standing to challenge the Notice, and the timeliness of Petitioner’s challenge assuming *arguendo* that it does have standing, as discussed *infra* at 22-27.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum to Petitioner’s Brief.

STATEMENT OF ISSUES

1. Whether Petitioner Sierra Club has standing to file a petition for review of the 90 Percent Notice, which commemorates that “sources accounting for not less than 90 per centum of the aggregate emissions of [seven specified

hazardous air pollutants] are subject to standards under subsections (d)(2) or (d)(4) of” 42 U.S.C. § 7412, thus satisfying EPA’s obligations under 42 U.S.C.

§ 7412(c)(6), where it is purely speculative that the requested vacatur of the Notice would result in substantive amendment of the relevant standards that would remedy the harm that Sierra Club’s members assert stems from allegedly insufficiently stringent control of hazardous air pollutants under those standards.

2. Whether Sierra Club’s arguments regarding the substance of emission standards referenced in the 90 Percent Notice are waived because they constitute untimely collateral attacks on those emission standards.

3. Whether the Court should entertain Sierra Club’s arguments, even if they are timely, since they relate to regulatory decisions outside the scope of the 90 Percent Notice that are based on separate and independent administrative records.

4. If Sierra Club’s arguments are properly before the Court, whether EPA’s stated position in the Notice – that sources of the hazardous air pollutants listed in 42 U.S.C. § 7412(c)(6) “are subject to standards” for purposes of that provision where EPA has promulgated emission standards for those sources that control the listed hazardous air pollutant via emissions limits on surrogate pollutants – is reasonable based on the law and the record.

5. Whether EPA’s determination of compliance with 42 U.S.C.

§ 7412(c)(6) was a legislative rule requiring notice and opportunity to comment in light of the fact that the Notice does not set forth any policy judgments or statutory interpretations, or otherwise change the Agency's approach to a particular matter.

STATEMENT OF THE CASE

In this suit, Sierra Club challenges an EPA notice entitled "Completion of the Requirement to Promulgate Emission Standards." This Notice, along with an accompanying technical memorandum, simply memorializes EPA's fulfillment, via numerous other previous regulatory actions, of its duties under section 112(c)(6) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(c)(6). Section 112(c)(6) requires EPA, with respect to seven specified hazardous air pollutants ("HAPs") – alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin – to take separate actions to "list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section." 42 U.S.C. § 7412(c)(6). EPA has met the 90-percent benchmark through a number of prior rulemakings. Accordingly, the Notice is nothing more than a simple accounting of EPA's previous regulatory efforts, explaining in

mathematical terms that EPA has previously listed sources and promulgated HAP standards sufficient to “assur[e] that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of” section 112 (or comparable provisions).

That is the limit of the Notice’s scope. It does not discuss or attest to the *substance* of the standards previously promulgated for each listed category and subcategory. The Notice only provides the mathematical and technical basis for EPA’s calculation that the source categories for which it has promulgated emission standards account for 90 percent of the baseline emissions of the section 112(c)(6) HAPs.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Background

The Clean Air Act is intended to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” 42 U.S.C. § 7401(b)(1). One way the Act does this is through section 112’s requirement that EPA promulgate regulations establishing standards to reduce emissions of hazardous air pollutants, or “HAPs.” *See id.* § 7412. In the 1990 amendments to the Act, Congress listed 189 hazardous air pollutants, including mercury

compounds. *Id.* § 7412(b)(1). Congress then established a multi-step process for regulating hazardous air pollutants under section 112, 42 U.S.C. § 7412. To address hazardous air pollutants and other pollutants emitted by solid waste incinerators, Congress established a similar process under section 129, 42 U.S.C. § 7429.

The first step in the process is the listing of categories and subcategories of major and area sources of hazardous air pollutants for eventual regulation. 42 U.S.C. § 7412(c). A “major source” is a stationary source or group of stationary sources at a single location and under common control that emits or has the potential to emit ten tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. *Id.* § 7412(a)(1). A “stationary source” of hazardous air pollutants is any building, structure, facility or installation that emits or may emit any such air pollutant. *Id.* § 7412(a)(3). Any stationary source that is not a major source is an “area source.” *Id.* § 7412(a)(2). Section 112(c)(1) required EPA to publish a list of all major source categories and subcategories within one year after the effective date of the 1990 amendments. *Id.* § 7412(c)(1). Additionally, section 112(c)(3) requires EPA to list “each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment.” *Id.* EPA was not required to

take these listing steps for solid waste incinerators, for which Congress itself established the categories to be regulated. *Id.* § 7429(a)(1).

1. The Ninety Percent Requirement

Section 112(c)(6) requires EPA to take action with respect to seven specific persistent, bioaccumulative hazardous air pollutants. The section states:

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

42 U.S.C. § 7412(c)(6).

This section thus establishes two distinct obligations. First, EPA is required to list source categories or subcategories accounting for at least ninety percent of the aggregate emissions of each of these specific pollutants. Second, EPA is

required to promulgate regulations that establish emission standards applicable to these sources pursuant to section 112(d)(2) or (d)(4), 42 U.S.C. § 7412(d)(2), (4).¹

2. Section 112(d) Emission Standards

CAA section 112(c)(2) requires that, “[f]or the categories and subcategories the Administrator lists,” EPA must “establish emissions standards under subsection (d) of this section.” 42 U.S.C. § 7412(c)(2). Sections 112(d)(2)-(5) define how to set those standards. Under section 112(d)(2), EPA imposes emission standards that require “the maximum degree of reduction in emissions of the hazardous air pollutants subject to” section 112 that EPA concludes is achievable, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements resulting from such standards. 42 U.S.C. § 7412(d)(2). These standards, rather than having to be established in a specific form, may consist of a broad range of measures, processes, methods, systems or techniques that reduce or eliminate emissions, enclose systems or processes, treat pollutants when released, require design or work

¹ Similar to section 112(c)(6), section 112(c)(3) requires that EPA list sufficient source categories or subcategories “to ensure that areas sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that [EPA has identified as presenting] the greatest threat to public health in the largest number of urban areas are subject to regulation” 42 U.S.C. § 7412(c)(3). The challenged Notice also memorializes EPA’s attainment of this goal, but Sierra Club does not contest that aspect of the Notice.

practices, or are a combination of such measures. *Id.* § 7412(d)(2)(A)-(E). These standards are referred to as “maximum achievable control technology” or “MACT.” Standards for incinerators under CAA section 129, while also set at “MACT” levels of stringency, are required by the statute to include numeric emissions limitations for certain pollutants such as lead, mercury, and dioxins and dibenzofurans, while other pollutants may be regulated through surrogate substances. *Id.* §§ 7429(a)(2), (4).

Section 112(d)(3) further specifies the minimum degree of stringency for MACT standards, commonly called the MACT “floor.” *See id.* § 7412(d)(3); *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 423 (D.C. Cir. 2011). For “new sources,”² the MACT floor shall not be less stringent than the level of emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. *Id.* For “existing sources,”³ the MACT floor may be less stringent than that for new sources, but may not be less stringent than the average emission limitation achieved by the best performing 12 percent of sources in the relevant category or subcategory (in the case of those with

² A “new source” is a stationary source the construction or reconstruction of which is commenced after EPA proposes a regulation under section 112 establishing an applicable emission standard. 42 U.S.C. § 7412(a)(4).

³ An “existing source” is any stationary source other than a new source. 42 U.S.C. § 7412(a)(10).

30 or more sources), or the average emission limitation achieved by the best performing five sources in the category or subcategory for those with fewer than 30 sources. 42 U.S.C. § 7412(d)(3)(A)-(B). For incinerators, the corresponding provisions governing MACT stringency are at sections 129(a)(2) and (3), 42 U.S.C. §§ 7429(a)(2), (3).

Section 112(d)(4) authorizes EPA, in lieu of meeting otherwise applicable minimum stringency requirements, to set a health-based standard for hazardous air pollutants for which a health threshold has been established. *Id.* § 7412(d)(4). Finally, section 112(d)(5) provides that, for listed area sources, EPA may set emission standards that “provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.” *Id.* § 7412(d)(5). Standards under this provision are termed “GACT.”

In setting emission standards for HAPs, “if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard . . . , the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard.” *Id.* § 7412(h)(1); *see also id.* § 7412(h)(2) (defining “not feasible”). Additionally, it is well established that “EPA may use a surrogate [substance] to regulate hazardous pollutants if it is ‘reasonable’ to do so,”

except as precluded by section 129(a)(4), 42 U.S.C. § 7429(a)(4) with respect to certain pollutants emitted by incinerators, as discussed above. *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 637 (D.C. Cir. 2000) (upholding EPA decision to regulate particulate matter (“PM”) emissions as a surrogate for regulation of HAP metal emissions from cement kilns, based on evidence that “HAP metals are invariably present in cement kiln PM,” *id.* at 639); *see also, e.g., Sierra Club v. EPA*, 353 F.3d 976, 982-85 (D.C. Cir. 2004) (upholding EPA’s use of particulate matter as a surrogate for HAP emissions in setting MACT standards for primary copper smelters).

Although not at issue here, EPA’s final step for regulating HAP emissions is to review promulgated MACT standards under sections 112(f)(2) and 129(h)(3) and revise them if required to provide an ample margin of safety to protect public health and to prevent adverse environmental effects. *See* 42 U.S.C. §§ 7412(f)(2), 7429(h)(3); *see also Natural Res. Def. Council, Inc. (“NRDC”) v. EPA*, 529 F.3d 1077, 1080 (D.C. Cir. 2008). In addition, EPA periodically reviews its previously promulgated emission standards: under section 112(d)(6), EPA is to periodically review all previously promulgated section 112 standards every eight years and revise them as necessary after considering developments in practices, processes and control technologies, while under section 129(a)(5) EPA is to review and, if

appropriate, revise standards applicable to incinerators every five years. 42 U.S.C. §§ 7412(d)(6), 7429(a)(5); *see also* *NRDC v. EPA*, 529 F.3d at 1080.

B. Regulatory and Litigation Background

1. The Baseline Emissions Inventory

In 1997, EPA issued a report containing a base-year emissions inventory of known sources of each HAP listed in CAA section 112(c)(6). *See* JA 1-134. The inventory identified all known sources of the section 112(c)(6) HAPs and estimated the national annual emissions for each source category as of 1990. Report at 1-3, JA0012. EPA chose 1990 as the baseline year because that was when the section 112(c)(6) requirements came into force as part of the CAA Amendments of 1990. *Id.* at 1-2, JA0011.

2. The Section 112(c)(6) Source Category Listing

In 1998 EPA published a notice identifying the source categories that, based on its 1990 emissions inventory, are responsible for 90 percent of the emissions of the seven pollutants identified in section 112(c)(6) from stationary, anthropogenic sources (*i.e.*, sources within the scope of sections 112 and/or 129). 63 Fed. Reg. 17,838 (Apr. 10, 1998). Sierra Club sought review of the listing notice, *see* *Sierra Club v. EPA*, No. 98-1270 (D.C. Cir.), but the suit was dismissed pursuant to CAA section 112(e)(4), which states:

[N]o action of the Administrator adding a pollutant to the list under subsection (b) of this section or listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category.

42 U.S.C. § 7412(e)(4). The dismissal order was issued “without prejudice to petitioner’s seeking judicial review once emissions standards are issued.” *Sierra Club v. EPA*, No. 98-1270, 1998 WL 849408, at *1 (D.C. Cir. Nov. 24, 1998).

EPA has updated the 1998 listing several times to remove source categories no longer needed to meet the section 112(c)(6) requirement based on updated information, and to add source categories subsequently determined to be necessary to reach the 90-percent threshold. *See, e.g.*, 76 Fed. Reg. 9450 (Feb. 17, 2011) (adding gold mine source category); 73 Fed. Reg. 1916 (Jan. 10, 2008) (finalizing decision not to regulate gasoline distribution area sources under section 112(c)(6)); 72 Fed. Reg. 53,814 (Sept. 20, 2007) (adding electric arc furnace steelmaking facility area source category); 67 Fed. Reg. 68,124 (Nov. 8, 2002) (removing several source categories).

3. The Deadline Suit

In 2001, Sierra Club filed suit in the U.S. District Court for the District of Columbia asserting, *inter alia*, that EPA had failed to meet the November 15, 2000 deadline to promulgate emission standards sufficient to satisfy the 90-percent

requirement in CAA section 112(c)(6). *See Sierra Club v. Jackson*, No. 01-1537 (D.D.C.). In the course of that suit, EPA explained that “once [it] completes emission standards for the remaining source categories under section 112(c)(6), it intends to issue a notice that explains how it has satisfied the requirements of section 112(c)(6) in terms of issuing emission standards for the source categories that account for the statutory thresholds identified in section 112(c)(6),” and the district court set a deadline (later extended) for EPA to complete that task. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 59 (D.D.C. 2006).

4. Individual MACT Rules

Since the enactment of the 1990 CAA Amendments, EPA has been working toward satisfying the 90-percent requirement of section 112(c)(6) by issuing individual emission standards for forty-nine source categories. *See* JA 150-53 (Table I.1). In the course of promulgating these standards, EPA has, where necessary, explained how the individual emission standards contribute to fulfilling the Agency’s obligations under section 112(c)(6). Some examples include:

- In individual rules regarding source categories regulated under CAA section 129, 42 U.S.C. § 7429 (such as commercial and industrial solid waste incineration (“CISWI”) units, municipal waste combustion (“MWC”) units, and hospital/medical/infectious waste incinerators (“HMIWIs”)), EPA has

noted that it considers such sources to be “subject to standards” for purposes of section 112(c)(6), since section 129 standards are “substantively equivalent to those promulgated under CAA section 112(d),” and EPA is precluded by CAA section 129(h)(2) from regulating incinerators under section 112(d). 76 Fed. Reg. 15,704, 15,708, 15,709 (Mar. 21, 2011) (CISWI standards); 74 Fed. Reg. 51,368, 51,399 (Oct. 6, 2009) (HMIWI standards); 70 Fed. Reg. 75,348, 75,356 (Dec. 19, 2005) (large MWC standards); 63 Fed. Reg. at 17,845 (section 112(c)(6) source category listing).

- EPA has responded to comments on individual MACT standards objecting that proposed standards are inadequate to satisfy the requirements of section 112(c)(6) because they do not directly impose emission limits that name the seven listed HAPs, explaining that the Agency considers sources to be “subject to standards” under section 112(c)(6) where the relevant section 112(c)(6) HAPs are “effectively controlled” by required control measures for other designated surrogate chemicals, even if the section 112(c)(6) HAPs are not subject to “separate, specific” emission standards. 76 Fed. Reg. at 15,718; *see also, e.g.*, 76 Fed. Reg. 15,608, 15,653-54 (Mar. 21, 2011) (concluding with respect to major source boilers that, as a byproduct of

combustion, polycyclic organic matter (“POM”) is controlled for purposes of section 112(c)(6) by required combustion and post-combustion controls, as well as numerical emissions limits for the surrogate chemical carbon monoxide, which is also a combustion byproduct and therefore an indicator of proper combustion conditions); 76 Fed. Reg. 15,554, 15,578 (Mar. 21, 2011) (similar as to major source boilers); 75 Fed. Reg. 54,970, 54,974 (Sept. 9, 2010) (portland cement plant standards); 74 Fed. Reg. at 51,390-91, 51,399-400 (HMIWI standards).

- EPA has described, in the context of individual MACT rulemakings, its methods for estimating section 112(c)(6) HAP emissions. *See, e.g.*, 76 Fed. Reg. at 15,566; 76 Fed. Reg. at 9456 (gold mine standards); 65 Fed. Reg. 15,690, 15,694 (Mar. 23, 2000) (secondary aluminum production standards).
- EPA has explained that section 112(c)(6) does not require a certain degree of emissions reduction, but that emission standards that *control* the section 112(c)(6) HAPs meet the requirements of sections 112(d)(2) or (d)(4). *See, e.g.*, 64 Fed. Reg. 6946, 6958 (Feb. 11, 1999) (secondary aluminum production standards proposal).
- EPA has addressed how section 112(c)(6) applies to area sources. *See, e.g.*, 64 Fed. Reg. 31,898, 31,911 (June 14, 1999) (portland cement standards).

A number of these MACT rules have been challenged in lawsuits, and Sierra Club has itself been a party to several such actions. *See, e.g., Med. Waste Inst. v. EPA*, 645 F.3d 420 (D.C. Cir. 2011).

5. The 90 Percent Notice

On March 21, 2011, EPA published a notice in the Federal Register announcing it had met its obligations under section 112(c)(6). 76 Fed. Reg. 15,308 (Mar. 21, 2011) (“90 Percent Notice” or “Notice”). The Notice itself contained the EPA Administrator’s conclusion that “EPA has completed sufficient standards to meet the 90-percent requirement under . . . section 112(c)(6).” *Id.* at 15,308. The Administrator based that determination on a technical memorandum “document[ing] the actions the Agency has taken to meet these requirements.” *Id.*

The memorandum explains that “[s]ection 112(c)(6) of the Clean Air Act (CAA) requires that EPA promulgate emission standards assuring that sources accounting for not less than ninety (90) percent of the aggregate emissions of each of the hazardous air pollutants (HAP) enumerated in section 112(c)(6) are subject to emission standards under section 112(d)(2) or (d)(4).” JA 135. It then summarizes a series of regulatory actions EPA has taken over the years to satisfy this requirement. For example, the Agency compiled the 1990 baseline emissions inventory for section 112(c)(6) HAPs, which served as the basis for its issuance in

1998 of a list of source categories accounting for 90 percent of emissions of the seven 112(c)(6) HAPs from stationary, anthropogenic sources. At times, over the years, EPA updated that list, adding or removing sources based on subsequent determinations that the sources are or are not necessary to meet the section 112(c)(6) requirement. Finally, EPA issued a series of emission standards for those sources needed to meet the 90-percent threshold set forth in section 112(c)(6). *See* JA 135-36.

SUMMARY OF ARGUMENT

Sierra Club purports to challenge the 90 Percent Notice on the ground that it rests on an incorrect construction of EPA's obligations under section 112(c)(6); in Sierra Club's view the only way EPA can discharge those obligations is to set separate, specific limits for the named section 112(c)(6) pollutants in any emission standards that count towards the 90-percent benchmark. However, this is neither the right time nor place to challenge EPA's judgments regarding the substantive content of the emission standards it has issued in the course of implementing the requirements of section 112(c)(6). EPA has previously identified the sources it intended to regulate in order to meet its obligations under section 112(c)(6), and has previously issued standards for those sources. Sierra Club's dispute lies with those standards themselves, and it has pursued (or, at times, failed to pursue)

challenges to several of the MACT rulemakings that address questions regarding section 112(c)(6). Some of those suits have not yet reached their culmination, and thus Sierra Club appears to be seeking a backdoor resolution of its claims by raising them in a collateral action regarding the 90 Percent Notice. Even if Sierra Club had not raised these issues elsewhere, they cannot be raised here because they represent a collateral challenge to the substantive basis of emission standards outside the time period provided for seeking review of those standards under the CAA; Congress has clearly mandated that challenges to these emission standards must be brought within sixty days of the issuance of the standards themselves.

Sierra Club has not challenged the 90 Percent Notice with respect to what it actually does contain: EPA's calculation of whether the source categories that the Agency has listed under section 112(c)(6) and subjected to emission standards do in fact account for 90 percent of the 1990 baseline emissions of the section 112(c)(6) HAPs. Instead, Sierra Club attempts to use this suit as a vehicle for raising belated challenges to the emission standards promulgated by EPA in the past, seeking a ruling that would require EPA to alter the substantive content of those standards, even though some of them have already withstood judicial review (including in litigation in which Sierra Club itself participated, *see infra* at 31-33). However, it is at best speculative whether this Court could grant Sierra Club any

relief for the harms it alleges, even if the Court were to reach out and address the substance of the standards listed in the 90 Percent Notice. Sierra Club argues that those standards are inadequate even though they contain measures that effectively control the relevant section 112(c)(6) HAPs through control of surrogate pollutants, simply because the standards do not include numeric emissions limitations *specifically naming* the 112(c)(6) HAP(s) for which the source category was listed. Thus, even if this Court *did* order EPA to set such a specific, numeric emissions limit for the relevant section 112(c)(6) HAPs, Sierra Club's alleged harms would only be remedied if altering the control measure to name the section 112(c)(6) HAP at issue actually resulted in lower emissions of those HAPs than those obtained under the existing standard. Sierra Club has not offered any evidence, or even alleged, that this would be the case. Therefore, it is mere speculation to assume that this Court could offer redress for the asserted injury to Sierra Club's members from allegedly insufficiently stringent emission standards, and Sierra Club lacks standing to sue.

Moreover, even if the Court were to reach out to consider the substantive adequacy of the emission standards promulgated by EPA for purposes of section 112(c)(6), Sierra Club could not prevail. It asserts that those standards fail to address emissions of the section 112(c)(6) HAPs because they do not contain

specific emissions limits for the listed HAPs, but such allegations are simply incorrect. Each of the emission standards discussed by Sierra Club requires control measures that do in fact address the section 112(c)(6) HAPs for which the source category was listed. There simply is no valid factual dispute on that front. Nor does EPA's position that standards for source categories listed under section 112(c)(6) must "address . . . the section 112(c)(6) HAP for which the source category was listed" undermine the propriety of the Agency's use of surrogates to address those HAPs. *See* Pet'r's Br. at 14-15. An emission standard need not contain a numerical emission limit specifically naming a section 112(c)(6) HAP in order to "address" emissions of that HAP, and to meet the statutory requirement that the "sources" are subject to standards.

For the same reasons, Sierra Club's claim that the Notice is a legislative rule that should have been subject to notice-and-comment procedures under the Administrative Procedure Act is without merit. Far from setting forth future policy or making regulatory decisions, the Notice simply commemorates the fact that EPA has, over the past decades, issued standards for source categories listed under section 112(c)(6) that account for at least 90 percent of the emissions of the section 112(c)(6) HAPs. In doing so, EPA had no obligation to provide notice and accept

comment on the substantive content of those standards for a second time after doing so in promulgating the standards themselves.

STANDARD OF REVIEW

When the Court's jurisdiction is challenged, the party petitioning for relief bears the burden of demonstrating that jurisdiction in fact exists. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Georgiades v. Martin-Trigona*, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984). If it cannot make that demonstration, its petition must be dismissed.

The 90 Percent Notice is subject to judicial review under 42 U.S.C. § 7607(b)(1). The applicable standard of review is set forth in section 706(2)(A) of the Administrative Procedure Act: the Notice may only be set aside if it is “arbitrary, capricious, an abuse of discretion, or not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Am. Forest & Paper Ass’n Inc. v. EPA*, 294 F.3d 113, 116 & n.3 (D.C. Cir. 2002). This narrow, deferential standard prohibits the Court from substituting its judgment for that of the Agency. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must consider whether the Agency's decision “was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (citation

omitted). The Agency's determinations must be upheld if they “conform to ‘certain minimal standards of rationality.’” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citation omitted).

In reviewing an agency's interpretation of a statute, a court must first consider whether Congress has directly addressed the particular question at issue. If so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). However, if a statute is silent or ambiguous on a particular issue, a reviewing court must accept the agency's reasonable interpretation of that statute. *Id.* at 843. The agency’s interpretation need not represent the only permissible reading of the statute nor the reading that the court might originally have given the statute. *Id.* at 843 n.11. Prior judicial constructions of a statute do not bind an agency, unless a court has held that the statute “unambiguously forecloses the agency’s interpretation.” *Nat’l Cable & Telecomm’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

ARGUMENT

I. Sierra Club Has Failed to Demonstrate that This Suit Will Redress Its Members’ Asserted Injuries, and Therefore Lacks Standing.

“[T]he irreducible constitutional minimum” of standing comprises three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “First, the

plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (internal quotation marks and citations omitted). “Second, there must be a causal connection between the injury and the conduct complained of” *Id.* Third, and critically, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (internal quotation marks and citations omitted). Here, Sierra Club’s petition is grounded only in conjecture and speculation.

Although Sierra Club asserts that its members are harmed by emissions of section 112(c)(6) HAPs from certain source categories, *see* Sierra Club Br. at 24-26, it provides no evidence that the emission standards it discusses in its brief fail to effectively control the section 112(c)(6) HAPs; instead, Sierra Club criticizes the standards on the technical ground that they do not contain numeric emissions limitations that specifically name those particular HAPs. However, as explained below, those standards control emissions of the HAPs through general combustion controls, or the establishment of an emission limit for a surrogate substance, or both. Nowhere does Sierra Club offer any basis to believe that, if EPA were forced to revisit those emission standards and set numeric limitations specifically naming the section 112(c)(6) HAPs, the resulting level of control would be any more

stringent than that achieved through regulation by surrogates or other control measures. Sierra Club's hope that requiring EPA to set specific emissions limits for the section 112(c)(6) HAPs will actually result in lower emissions of those HAPs is not supported by any portion of Sierra Club's brief or standing declarations.⁴

The procedural injury argument proffered by Sierra Club is equally unavailing. *See* Sierra Club Br. at 26. Sierra Club asserts that, had EPA provided notice and opportunity for comment, its members would have contested EPA's calculation that its prior regulatory efforts were sufficient to reach the 90-percent benchmark for all the section 112(c)(6) HAPs. *Id.* The only declaration submitted by Sierra Club on this point indicates that, if given the opportunity, Sierra Club would have submitted comments on the 90 Percent Notice stating that "all sources accounting for ninety percent of the emissions of each of these . . . [section 112(c)(6) HAPs] are not subject to emissions standards as § 112(c)(6) requires and

⁴ Sierra Club's standing declarations do not allege any harm from unregulated source categories, but rather identify only harm allegedly caused by emissions from source categories already subject to emission standards. *See* Sierra Club Br. at 24-26. There is therefore no basis to believe that any remedy requiring regulation of additional source categories would redress the injury asserted by Sierra Club's members.

that EPA's determination is therefore incorrect." Carman Decl. ¶ 7. However, these alleged procedural harms are illusory.⁵

As recognized by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), procedural injury may be sufficient to confer standing on an individual only "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.* at

⁵ The Carman Declaration also indicates that Sierra Club:

would have used the information acquired through the notice and comment rulemaking process to educate and inform the public about the serious risks presented by PBT's [pervasive bioaccumulative toxics] like those enumerated under § 112(c)(6), the importance of controlling emissions of those toxics, and to advocate that EPA to take [sic] prompt and effective action in accordance with the Clean Air Act.

Id. ¶ 9. This may constitute an attempt to allege informational injury. *See Akins v. FEC*, 101 F.3d 731, 735 (D.C. Cir. 1997) (en banc) ("We have recognized in our 'informational standing' cases that a party may be entitled to sue in federal court to force the government to provide information to the public (and thereby to it) if the government's failure to provide or cause others to provide that particular information specially affects that party."). If so, such a theory is not articulated in Sierra Club's brief and is therefore waived. *See Fitts v. Fed. Nat'l Mortgage Ass'n*, 236 F.3d 1, 3 n.2 (D.C. Cir. 2001) (argument is waived where it is not contained in appellant's brief). In any case, Sierra Club never explains what information it might have obtained from EPA regarding the risks of pollutants in the course of notice and comment proceedings, given that the notice merely documents the existence of standards promulgated to satisfy section 112(c)(6). Sierra Club has therefore failed to adequately assert a specific injury sufficient to demonstrate standing. *Cf. Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001) (dismissing for lack of standing where the appellants had failed to make clear "what facts, specifically, were not being disclosed").

573 n.8. This Court accordingly noted in *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc), that “[t]o demonstrate standing . . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.” *Id.* at 664-65. As described above, there is no such causal connection here, since Sierra Club's allegations relate to the substance of rulemakings promulgated *prior to* the 90 Percent Notice. *See supra* at 33-34. The 90 Percent Notice, though recounting that EPA had previously issued certain standards, was not itself a vehicle for imposing any emission standards under section 112; thus Sierra Club's proposed comments on the proper substantive content of those prior standards would be both untimely and inapposite if submitted as comments on the 90 Percent Notice.

Sierra Club therefore has not carried its burden of demonstrating constitutional standing. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (“[T]he petitioner must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals.”). Sierra Club criticizes the form of EPA's emission standards, but never explains

how, even if its arguments are correct, the Court may provide any relief that will redress the asserted injury to Sierra Club's members. Nor does Sierra Club's inability to offer comments that in fact concern prior EPA rulemakings – not the contents of this Notice – constitute procedural injury supporting standing.

II. Sierra Club's Challenge to the Substance of Emission Standards Referenced in the 90 Percent Notice Is Barred as Untimely Under 42 U.S.C. § 7607(b)(1).

A. Sierra Club's Arguments Constitute an Improper, Untimely Collateral Attack on the Substance of the Standards Promulgated by EPA to Satisfy Its Obligations Under Section 112(c)(6).

EPA's mandate under CAA section 112(c)(6) is a straightforward task: to “list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of” seven listed HAPs are “subject to standards under” sections 112(d)(2) or (d)(4). EPA has fulfilled the requirements of this provision. The Agency has assembled a baseline inventory of the sources of emissions of the section 112(c)(6) HAPs; has listed the categories of sources that account for at least 90 percent of the emissions of those HAPs; and, in the challenged Notice, has provided an accounting of the standards that it has promulgated for sources under sections 112(d)(2) and (d)(4) (along with equivalent standards under section 129) to meet the 90-percent benchmark. Sierra Club does not challenge the fact that the identified source categories are “subject to

standards.” Instead, Petitioner challenges the content of those standards, seeking untimely, collateral review of issues that Sierra Club has had the opportunity and obligation to raise in petitions relating specifically to those standards.

Sierra Club’s principal argument is that EPA is acting inconsistently with its own interpretation of its section 112(c)(6) obligations because certain of the emission standards relied on by EPA in the 90 Percent Notice “do not include emission standards for the relevant § 112(c)(6) pollutants and do not even mention § 112(c)(6), far less address the agency’s obligations under this provision.” Sierra Club Br. at 12. Specifically, Sierra Club relies on comments in the preamble to the Gold Mines MACT rule, in which EPA explained that section 112(c)(6) requires it to “address . . . the section 112(c)(6) HAP for which the source category was listed,” 76 Fed. Reg. at 9457/1, and that section 112(c)(6) is “obviously intended to ensure controls for specific persistent, bioaccumulative HAP.” *Id.* at 9457/2. Sierra Club contends that these statements foreclose EPA from addressing section 112(c)(6) HAPs through surrogate substances or through control measures other than numerical emissions limitations, and that the Agency must instead employ a numerical emissions limitation specifically naming the section 112(c)(6) HAP to be regulated. *Id.* at 29-30. Sierra Club’s argument is based on a fundamental misunderstanding of EPA’s position. *See infra* at 41-43. However, the Court lacks

jurisdiction even to reach the issue, because those EPA statements relate to the Agency's obligations in setting individual MACT rules; thus, Sierra Club's argument should have been raised in timely, direct challenges to those rules. They may not be made in this belated, backdoor attack.

To allow Sierra Club to challenge particular applications of section 112(c)(6) that EPA has adopted in prior rulemakings promulgating emission standards, would allow, in essence, a petition for review of those standards well outside the sixty-day window for challenging those standards under CAA section 307(b)(1), which provides that “[a] petition for review of action of the [EPA] Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . shall be filed within sixty days from the date notice of such promulgation . . . appears in the Federal Register” 42 U.S.C.

§ 7607(b)(1). That time limit “is jurisdictional in nature, and may not be enlarged or altered by the courts.” *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009).

Once the sixty-day period has lapsed, a party may not raise arguments that “were available to them at the time the rule was adopted,” especially where EPA actually highlighted the relevant issues at the time. *Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1350 (D.C. Cir. 1995); *cf. Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 909 (D.C. Cir. 1985) (dismissing as untimely a petition for review of an EPA list

of contaminated sites that might warrant cleanup, where the substance of the petitioner's challenge related to a model used by EPA to determine which sites to add to the list, and the model itself had been promulgated in a separate EPA rulemaking). The time limitation in 42 U.S.C. § 7607(b)(1) therefore bars Sierra Club from getting a second bite at the apple by pursuing legal arguments here regarding the substance of previously promulgated emission standards, where Petitioner failed to raise those arguments in petitions for review of the individual standards or where such direct legal challenges are the subject of separate, ongoing litigation before this Court.

That Sierra Club might contend that it had no opportunity to raise its arguments as to the MACT rules that were promulgated before the source categories were listed under section 112(c)(6), or that its grievance is based on EPA's more recent statements in promulgating the Gold Mines MACT standard, does not mean that it may raise such claims in a challenge to the 90 Percent Notice. This Court specified in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), a procedure for pursuing claims that new information merits revision of a previous agency regulation: the prospective petitioner must first bring the new information to the agency's attention in an administrative petition seeking revision of the prior regulation. Thus, if Sierra Club wishes to assert that

EPA's existing MACT standards are now inadequate under section 112(c)(6) either because the source category was subsequently listed under that provision, or because Sierra Club believes EPA's interpretation of its section 112(c)(6) obligations has changed, Sierra Club can raise that matter in a petition to EPA. Sierra Club can then obtain judicial review of any final EPA response to such a petition. *See id.* (“[W]e find it within our inherent powers to enforce our interest in informed decision-making by requiring presentation to the Administrator of any new information thought to justify revision of a standard of performance, or any other standard reviewable under Section 307, before we will exercise our Section 307 jurisdiction.”). As Sierra Club has yet to avail itself of such an opportunity, this suit challenging the 90 Percent Notice cannot satisfy Sierra Club's obligation under *Oljato*.

In any case, it is indisputable that Sierra Club has already had – and has on occasion taken – the opportunity to press the argument that EPA is required to include numerical emissions limitations specifically naming the section 112(c)(6) HAPs in any standard promulgated for a source category listed under section 112(c)(6). EPA's reliance on surrogates in controlling section 112(c)(6) HAPs is a practice that the Agency has repeatedly utilized in other emission standards subject to challenge by Sierra Club and others. For example, in the 2010 emission

standards for the Portland Cement Plant source category, EPA expressly used total hydrocarbon (“THC”) as a surrogate for polycyclic organic matter (“POM”) and polychlorinated biphenyls (“PCBs”) for purposes of complying with section 112(c)(6). 75 Fed. Reg. at 54,974 (Sept. 9, 2010); 74 Fed. Reg. 21,136, 21,150 (May 6, 2009) (discussing use of THC as surrogate in proposed rule). Sierra Club commented on this standard, and once it was finalized sought judicial review, *see Portland Cement Ass’n v. EPA*, No. 10-1358 (D.C. Cir.), Corrected Petitioner Brief (5/17/2011), but in neither context did Sierra Club challenge EPA’s use of a surrogate for section 112(c)(6) HAPs.

EPA similarly used carbon monoxide (“CO”) as a surrogate for POM and PCBs, and dioxins/furans as surrogates for PCBs, in setting emission standards for hospital/medical/infectious waste incinerators, and although adverse comments were filed on this issue, Sierra Club did not pursue any objection to EPA’s use of surrogates and even participated in subsequent litigation as an intervenor in support of the standard. *See* 74 Fed. Reg. at 51,390; *Med. Waste Inst. v. EPA*, No. 09-1297 (D.C. Cir.). That case has been fully litigated and resulted in an opinion of this Court. *Med. Waste Inst. v. EPA*, 645 F.3d 420 (D.C. Cir. 2011). Sierra Club has waived its objection to EPA’s use of surrogates in each of these rules, and this belated, backdoor challenge to EPA’s longstanding practice must be dismissed

as improper and untimely. *See Med. Waste Inst.*, 645 F.3d at 427 (holding petitioners' claim that EPA invalidly used a pollutant-by-pollutant approach in setting MACT floors in 2006 emission standard was barred by section 307(b)(1) where EPA had used the same approach without objection in promulgating the 1997 version of the standard).

Sierra Club has even raised the exact same line of argument that it appears to be pursuing here in a previous suit. In *Northeast Maryland Waste Disposal Authority v. EPA*, No. 01-1053 (D.C. Cir.), Sierra Club challenged EPA's decision not to include a specific numeric emissions limitation for PCBs in the section 129 emission standard for small municipal waste combustion ("MWC") units, contending that section 112(c)(6) requires such a limitation because EPA had listed the small MWC source category as a source of PCBs under section 112(c)(6).⁶ Sierra Club Br. at 34, Doc. No. 755605, No. 01-1053 (D.C. Cir. June 19, 2003); *see also Northeastern Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936 (D.C. Cir. 2004) (remanding rule to EPA on other grounds). Although Sierra Club alleges that it has not yet litigated that case and other similar challenges to conclusion, *see* Sierra Club Br. at 19-20, it is not proper for Sierra Club to raise

⁶ Sierra Club agreed to withdraw that claim after filing its opening brief, as it was at the time engaged in settlement negotiations with EPA on the issue. Sierra Club Reply Br. at 17, Doc. No. 755605, No. 01-1053 (D.C. Cir. Sept. 22, 2003).

collateral issues in this litigation simply because it prefers the pace at which this suit is proceeding.⁷

Nor can Sierra Club assert that it seeks to raise some issue that did not arise in those earlier rulemakings. Sierra Club's own filings state that its arguments relate to EPA interpretations of section 112(c)(6) that the Agency set forth in individual emission standards such as the Gold Mine Facilities Rule and Area Source Boilers Rule. *See* Sierra Club Br. at 17. Likewise, all of the declarations that Sierra Club offers to demonstrate standing attest to injury caused by HAP emissions from source categories for which EPA has already promulgated emission standards, thus demonstrating that Sierra Club's claims relate to the *content* of those standards, not to their mere existence. *See* Decl. of Eric Uram

⁷ Indeed, Sierra Club appears content to pursue the proper course – challenging particular EPA decisions regarding how to apply section 112(c)(6) in the context of the rules where the Agency made those decisions – with respect to other arguments about the interpretation of section 112(c)(6). In the ongoing case *Desert Citizens Against Pollution v. EPA*, No. 11-1113 (D.C. Cir.), Sierra Club has challenged EPA's emission standard for the Gold Mine Ore Processing and Production area source category. *See* 76 Fed. Reg. 9450 (Feb. 17, 2011). Among the principal issues that Sierra Club has raised is whether section 112(c)(6) imposes an independent obligation on EPA to set MACT standards for all HAP emitted by an area source category listed under section 112(c)(6), rather than setting a MACT standard for the section 112(c)(6) HAP for which the source category was listed and subjecting other HAPs to GACT standards pursuant to section 112(d)(5), which are often less stringent. *See* (Corrected) Br. for Pet'rs at 23-30, 32-33, Doc. No. 1326853, No. 11-1113 (D.C. Cir. Aug. 30, 2011).

¶ 10 (large municipal waste incinerator); Decl. of Jesse N. Marquez ¶¶ 6, 8 (petroleum refineries, municipal waste incinerator); Decl. of Richard E. Quiggle ¶ 3 (coke plant); Amended Decl. of Karla Land ¶ 4 (area and major source boilers, pesticide manufacturer, petroleum refinery); *see also* JA0150-51 (listing these source categories among those for which EPA has promulgated emission standards). In sum, Sierra Club's arguments constitute impermissible collateral attacks on the emission standards themselves; they cannot be raised out of time in a petition for review of the 90 Percent Notice, which merely documents that those standards were long ago issued by EPA as required under section 112(c)(6).

B. Even If Sierra Club's Suit Were Timely, Its Arguments About the Substance of Emission Standards Are Not Properly Before the Court In Reviewing the 90 Percent Notice.

In the 90 Percent Notice, EPA merely documents that it has previously established emission standards for sources and that these sources account for 90 percent of emissions of the seven HAPs listed in section 112(c)(6). The substantive adequacy of those individual standards, in light of the requirements of section 112(d) (or section 129(a) for incinerators), or section 112(c)(6) itself, is an issue that could and should have been raised in a challenge to the emission standards themselves, allowing EPA to defend its regulatory choices where it has made them, based on the full record underlying the standards. *Cf. Env'tl. Def.*

Fund v. EPA, 852 F.2d 1316, 1330 (D.C. Cir. 1988) (refusing to consider an issue raised by petitioner in a challenge to an EPA rule that did not directly address that issue).

Indeed, reviewing questions regarding the sufficiency of a standard for purposes of section 112(c)(6) in a direct challenge to that standard is the most sensible approach. Such an attack may implicate questions that can only be productively addressed by looking at the record underlying the individual emission standard, in particular whether EPA has reasonably relied on regulation of a surrogate substance to regulate one of the section 112(c)(6) HAPs. *See, e.g.*, 76 Fed. Reg. at 15,653-54 (relying on multiple facts in record in describing EPA rationale for using particulate matter as a surrogate for POM). Reviewing individual emission standards in light of section 112(c)(6) at the time they are issued allows the standard to be upheld or remanded and revised, if necessary, based on the contemporaneous administrative record. Sierra Club's approach, on the other hand, would require the Court to undertake the unwieldy task of indirectly considering the merits of numerous prior regulatory decisions only after EPA has ostensibly fulfilled the requirements of section 112(c)(6) – potentially years after the promulgation of the underlying standards and in the absence of their respective administrative records. EPA did not re-open or reconsider the

administrative records underlying the technical decisions reached in the standards that the Agency included in its ministerial tally of the standards credited toward satisfying its section 112(c)(6) obligations, and thus the administrative records for those standards are not part of the record for the 90 Percent Notice and are not before this Court. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). Moreover, contemporaneous review of whether an emission standard is sufficient under section 112(c)(6) is consistent with section 112(e)(4), which provides that EPA’s action in listing a source category under section 112(c) (including section 112(c)(6)) “may be reviewed under [42 U.S.C. § 7607] *when the Administrator issues emission standards for such category.*” 42 U.S.C. § 7412(e)(4) (emphasis added). In other words, the appropriate juncture for determining the particulars of how EPA must regulate a given HAP source category under section 112 is when the Agency actually promulgates a substantive emission standard for that category.

III. EPA Has Satisfied Its Obligations Under Section 112(c)(6).

If the Court nonetheless holds that it may properly reach the substance of Sierra Club’s arguments, the 90 Percent Notice should still be upheld because EPA reasonably determined that it has assured that “sources accounting for not less than

90 per centum of the aggregate emissions of [seven specified hazardous air pollutants] are subject to standards under subsections (d)(2) or (d)(4),” as required by section 112(c)(6).

A. EPA’s Interpretation of the Section 112(c)(6) “Subject to Standards” Requirement Is Reasonable.

As discussed above, EPA believes that Sierra Club’s arguments regarding the substance of the standards imposed on source categories listed by EPA under section 112(c)(6) is not properly before the Court. However, if the Court does reach the question of whether EPA has reasonably interpreted section 112(c)(6) in determining how to regulate the sources emitting the section 112(c)(6) HAPs, then EPA’s construction of the statute as imposing a requirement for *effective* control of the relevant section 112(c)(6) HAP, rather than a specific numeric emissions limit naming the pollutant, should be upheld.

Under the applicable standard of review, EPA’s interpretation “governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-44). Here, EPA’s approach is rooted in a plain reading of the text of section 112(c)(6), which requires the Agency to assure that “*sources* accounting for” at least 90 percent of the emissions of the listed HAPs are “subject to

standards” under sections 112(d)(2) or (d)(4), without specifying the form of those standards, or how those standards must operate or be applied to those sources. The provision does not, as Sierra Club implies, expressly state that EPA can meet section 112(c)(6) only by setting named standards “for these [listed] pollutants.” *See* Pet’r Br. at 30. Indeed, this Court long ago upheld EPA’s approach of satisfying its general obligation under section 112 to “set emission standards for each” HAP listed in that provision by means of regulation through surrogates, as long as the choice of the surrogate is itself reasonable. *Nat’l Lime Ass’n*, 233 F.3d at 634, 637; *see also, e.g., Sierra Club v. EPA*, 353 F.3d 976, 982-85 (D.C. Cir. 2004).

Moreover, section 112(c)(6) contains a numeric benchmark only as to the percentage of *sources* that must be controlled, not the amount of emissions. As this Court explained in *National Lime*, where “EPA is under no obligation to achieve a particular numerical reduction in HAP . . . emissions,” but rather only to apply MACT based on the HAP reductions “achieved” by certain facilities, “then the EPA may require . . . control [of a surrogate] without quantifying the reduction in [the target] HAP . . . thus achieved.” 233 F.3d at 639. The same rationale applies here, where EPA’s only obligation under section 112(c)(6) is to apply the same MACT standard considered in *National Lime* to particular sources

accounting for 90 percent of emissions of the section 112(c)(6) HAPs. Provided that EPA has set standards pursuant to sections 112(d)(2) or (d)(4) (or equivalent standards) for substances identified as surrogates for the section 112(c)(6) HAPs, EPA has fully met its obligation to set standards assuring that sources accounting for 90 percent of the aggregate emissions of the section 112(c)(6) pollutants at issue are subject to standards.

Congress *did* expressly require EPA to set numerical emissions limitations for a list of nine substances emitted by solid waste incineration units in 42 U.S.C. § 7429(a)(4), another provision of the CAA also enacted in 1990. Section 112(d)(2), on the other hand, makes clear that MACT standards need not be in the form of numeric emissions limitations for particular HAPs; they may consist of a broad range of measures to control emissions, treat pollutants when released, require particular design or work practices, or some combination of such measures. *Id.* § 7412(d)(2)(A)-(E). This contrast demonstrates that, where Congress intended to require EPA to set numeric limits for a certain named pollutant, it knew how to impose such a requirement and in fact did so. Congress conspicuously did not take this approach with respect to the standards mandated by section 112(c)(6), and thus left intact EPA's discretion for all other purposes under section 112 to set standards for surrogates, as recognized in *National Lime*.

Sierra Club misconstrues EPA's recent statements in the preamble to the Gold Mines emission standard that section 112(c)(6) requires standards that "address" and "ensure controls for" the section 112(c)(6) HAP, 76 Fed. Reg. at 9457. *See* Sierra Club Br. at 28, 29. Those statements, which Sierra Club takes out of context, in no way alter or conflict with EPA's longstanding use of surrogates in subjecting HAP emissions to MACT controls, a practice this Court has already endorsed.

Foremost, Sierra Club's implication that by making such statements EPA interpreted section 112(c)(6) to require numeric emissions limits for the section 112(c)(6) HAP for which a source category was listed is incorrect and ignores the context in which the statements were made. The cited portion of the preamble to the Gold Mines rule responds to comments that asserted that in addition to the HAP (mercury) for which EPA was claiming section 112(c)(6) credit, EPA was required under section 112(c)(6) to set MACT standards for *all* other HAPs emitted by the source category as well, including HAPs not listed in section 112(c)(6). 76 Fed. Reg. at 9456/3-57/2. The Gold Mines source category emitted only one section 112(c)(6) HAP – mercury – and therefore EPA's statement that the Agency was required to ensure controls "for the section 112(c)(6) HAP" meant simply that EPA did not believe it had any obligation to regulate HAPs emitted by

Gold Mines facilities that are *not* listed in section 112(c)(6). That response did not reach the question of what the substantive content of the required controls might be, and therefore it in no way conflicts with EPA's longstanding approach that control of section 112(c)(6) HAPs for which a source category is listed may be achieved through measures other than a numeric emissions limit naming such HAPs.

In particular, in *National Lime*, this Court clearly sanctioned the reasonable use of surrogates to discharge EPA's "obligation to set emission standards for each listed HAP," *Nat'l Lime*, 233 F.3d at 634, under 42 U.S.C. § 7412(d)(1), which requires EPA to "promulgate regulations establishing emission standards for each category or subcategory of major sources . . . of hazardous air pollutants listed for regulation." *See Nat'l Lime*, 233 F.3d at 633. EPA has relied on *National Lime*, among other cases, in promulgating MACT standards that control section 112(c)(6) HAPs through measures that control surrogate substances. *See, e.g.*, 70 Fed. Reg. at 59,402, 59,433 (Oct. 12, 2005) (hazardous waste combustor standards). None of the EPA statements cited by Sierra Club evidences *any* intent to deviate from this long-accepted approach in setting standards for source categories listed under section 112(c)(6). Nor does Sierra Club explain why such an approach would be

adequate to comply with section 112(d)(1), as sanctioned by *National Lime*, but inadequate to control HAPs for purposes of section 112(c)(6).

Thus, EPA's application of section 112(c)(6) in determining the content of emission standards for the sources accounting for 90 percent of the emissions of the section 112(c)(6) HAPs constitutes a reasonable interpretation of that provision.

B. Sierra Club Has Not Offered Any Factual Evidence That the Source Categories Identified in the 90 Percent Notice Are Not "Subject to Standards" for Purposes of Section 112(c)(6).

In claiming that the emission standards underlying the 90 Percent Notice are insufficient, Sierra Club has merely listed nine different source category emission standards and asserted, without any factual support, that they "do not include emission standards for the relevant § 112(c)(6) pollutants." Sierra Club Br. at 12; *see also id.* at 11-13. Although Sierra Club implies that these emission standards have nothing to say about the section 112(c)(6) HAPs, and therefore may not be credited toward the 90-percent benchmark, that is far from the case.

1. Pesticide Manufacturing, Coke Ovens, Synthetic Organic Chemical Manufacturing.

With respect to several of the identified emission standards, Sierra Club is simply incorrect. Sierra Club appears to have assumed the standard did not directly control the relevant section 112(c)(6) HAP where it was not the subject of

an express numerical standard naming that pollutant, an assumption belied by a more thorough reading of the explanation of the standards provided by EPA in the Federal Register.

In the emission standards for the pesticide manufacturing source category, which was included in the 90 Percent Notice for its emissions of hexachlorobenzene (“HCB”), JA 151, EPA has expressly stated that emission standards for this category do address HCB. 64 Fed. Reg. 33,550, 33,552-53 (June 23, 1999) (“The PAI [pesticide active ingredient] production source category also emits small amounts of other listed pollutants including . . . hexachlorobenzene [and other HAPs] Emissions of these pollutants will be reduced by implementation of today's final rule.”). Understandably, no party ever raised any challenge to this rule based on its failure to regulate HCB.

As to coke ovens, which were included in the 90 Percent Notice for their emissions of POM, JA 150, EPA explained in the proposal for the coke oven emission standard:

The emissions from . . . coke batteries include organic and inorganic particulate matter, volatile organic compounds (VOC), and gases such as H₂S, SO₂, nitrogen oxides (NO_x) ammonia (NH₃), CO, and others. The pollutants of primary interest with respect to long-term or chronic health effects are various carcinogenic polycyclic organic compounds (such as benzo(a)pyrene), which are found in the organic particulate matter of coke oven emissions. . . . Implementation of the proposed MACT standard is expected to reduce nationwide coke oven emissions from charging and leaks by the end

of 1995 by about 66 percent to 270 Mg/yr, and emissions from bypass/bleeder stacks will be reduced by at least 98 percent to no more than 17 Mg/yr.

57 Fed. Reg. 57,534, 57,556 (Dec. 4, 1992). In other words, the coke ovens emission standard imposes measures to control coke oven HAP emissions, including emissions of polycyclic organic compounds, even though it does not explicitly and separately discuss POM emissions. *See id.* at 57,536 (proposing numeric emission limits and work practice standards to control charging and leaks). Sierra Club does not dispute this as a factual matter, and never sought to challenge this standard as inadequate. Nor did Sierra Club seek review of EPA's subsequent revision of the standard under CAA sections 112(f) and 112(d)(6), 42 U.S.C. §§ 7412(f), 7412(d)(6). *See* 70 Fed. Reg. 19,992 (Apr. 15, 2005).

The Synthetic Organic Chemical Manufacturing Industry category was included in the 90 Percent Notice for its emissions of HCB. JA 150, 155. The emission standard for this source category clearly applies to HCB, which is listed among the HAPs regulated through the MACT control measures required under the rule. *See* 59 Fed. Reg. 19,402, 19,405 (Apr. 22, 1994) (explaining that subparts F, G, and H of the standard regulate a list of 112 HAPs, including HCB, with subpart G containing applicable MACT standards for regulated sources). Sierra Club does not dispute this, and did not challenge either the original MACT standard for organic

HAP emissions from the industry, or EPA's subsequent review of that standard under sections 112(f) and 112(d)(6), on that basis. *See* 71 Fed. Reg. 76,603 (Dec. 21, 2006) (reviewed in *NRDC v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008)).

2. Aerospace Manufacturing and Rework Facilities, Petroleum Refineries, and Pulp and Paper Mills.

Similarly, Sierra Club appears to have missed the fact that at times EPA has referred to certain section 112(c)(6) HAPs as part of more general descriptions of HAPs being controlled by a given emission standard. In particular, several of the emission standards for source categories listed under section 112(c)(6) for emissions of POM provide MACT standards for control of "organic HAP" emissions, of which POM is a subset.⁸ *See* 60 Fed. Reg. 45,948, 45,962 (Sept. 1, 1995) (aerospace facilities); 60 Fed. Reg. 43,244, 43,245 (Aug. 18, 1995) (petroleum refineries); 66 Fed. Reg. 3180, 3185 (Jan. 12, 2001) (pulp and paper mills). Moreover, Sierra Club has never sought to challenge these standards on the ground that they fail to properly address POM emissions.

⁸ Polycyclic organic matter ("POM") is defined in the CAA as including organic compounds with more than one benzene ring and a boiling point over 100 °C. 42 U.S.C. § 7412(b)(1), n.4. Techniques used to control organic HAP, such as ensuring complete combustion, also achieve requisite control of POM and PCBs. Prior EPA rules have discussed the use of surrogates such as CO (as an indicator of complete combustion). *See* 74 Fed. Reg. at 51,390/3 (HMIWI emission standards, discussing regulation of POM and PCBs through control of CO as sufficient to satisfy requirements of section 112(c)(6)).

3. Municipal Waste Combustors, Hospital/Medical/Infectious Waste Incinerators, and Hazardous Waste Combustors.

The rest of the standards named by Sierra Club appear to be faulty in Petitioner's eyes because they do not contain a numerical emissions limitation "for the" HAP for which the category was listed under section 112(c)(6). *See* Pet'r's Br. at 28. As outlined above, EPA interprets section 112(c)(6) to allow sources to be "subject to standards" that effectively (even if indirectly) control the relevant HAP, and has relied on that interpretation in prior emission standard rulemakings, such that any challenge raised to that approach now is untimely and improper. Meanwhile, it is clear as a factual matter that the emission standards in the above-noted rules do provide for effective control of the section 112(c)(6) HAP for which the source category was listed. As to municipal waste combustors, which were listed for their emissions of PCBs, the relevant emission standards provide MACT-type standards for control of combustion, which controls PCB emissions because PCBs are byproducts of combustion. 70 Fed. Reg. at 75,356 (proposed municipal waste combustor rule; final rule published at 71 Fed. Reg. 27,324 (May 10, 2006)). Similarly, EPA has relied on the regulation of surrogate substances or processes in promulgating emission standards for hospital/medical/infectious waste incinerators. 74 Fed. Reg. at 51,390-91, 51,399-400 (HMIWI standards; identifying other substances subject to direct control measures as "effective

surrogate[s]” for POM and PCBs); 70 Fed. Reg. at 59,433 (hazardous waste combustors; explaining that 1999 emission standards, 64 Fed. Reg. 52,828 (Sept. 30, 1999), control POM and PCBs emissions through MACT standards for surrogate substances, *i.e.*, carbon monoxide and hydrocarbons).

In sum, Sierra Club has not offered any reason for the Court to doubt that the only conclusion set forth in the 90 Percent Notice – that EPA has “subject[ed] to standards” those source categories accounting for 90 percent of emissions of the seven section 112(c)(6) HAPs – is true. All Sierra Club argues is that section 112(c)(6) requires those standards to specifically include named emissions limits “for the” HAPs for which they were listed. As demonstrated above, there is no such requirement. Further, the adequacy of any particular standard is a question that can be resolved only in the substantive context of the emission standard for each particular source category, especially where EPA has made such context-dependent decisions as controlling a section 112(c)(6) HAP through a surrogate substance. Sierra Club had the opportunity to obtain judicial review of the emission standards where EPA has applied section 112(c)(6) to allow the use of surrogates, and has otherwise outlined its position with respect to what substantive obligations that provision might impose on EPA. It is both improper and unnecessary for Sierra Club to pursue such arguments here, with respect to an EPA

action that neither sets forth any regulatory decisions, nor imposes any substantive emission standards, but rather simply performs the bookkeeping exercise of listing the standards previously issued for source categories listed under section 112(c)(6) and calculating that those categories account for 90 percent of the emissions of the section 112(c)(6) HAPs.

IV. The Administrative Procedure Act Did Not Require EPA to Provide Public Notice and Opportunity for Comment on the 90 Percent Notice.

Sierra Club contends that the 90 Percent Notice is invalid because it is a “rule” that was promulgated without notice and an opportunity for public requirement, in violation of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 553(b), (c), 551(5). Notwithstanding Sierra Club’s characterizations of the 90 Percent Notice, it does not fit the APA’s definition of a rule: “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” 5 U.S.C. § 551(4).

The Notice does not set forth any original regulatory interpretation or prescribe any future policy; it does not fill any gaps in the meaning of section of 112; and it does not impose any prospective regulatory requirements. It merely makes a mechanical, factual certification based on completed EPA rulemakings and established EPA policy choices, recognizing that through those prior actions

EPA has reached the applicable statutory benchmark. As described above, this straightforward act of documentation did not itself contain, implicitly or explicitly, any new policy interpretation of section 112(c)(6); rather, such policy decisions were made in the course of the Agency's promulgation of those substantive standards, and must rise and fall on judicial review of such standards, not this collateral attack on a simple bookkeeping action by EPA.

This Court has recognized that an agency action that does not set forth any policy judgments or statutory interpretations, or otherwise change the agency's approach to a particular matter, is not a rulemaking. In *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004), then-Judge Roberts explained that where an EPA letter simply restated the Agency's position on an issue, but "tread no new ground" and "left the world just as it found it," the letter could not "be fairly described as implementing, interpreting, or prescribing law or policy." *Id.* at 428; *see also Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1117 (D.C. Cir. 1988) (holding that an EPA publication was not a rule within the meaning of the APA where it did not "change any law or official policy presently in effect"). Like the letter at issue in *Independent Equipment Dealers*, the Notice is a simple accounting of EPA's previous regulatory efforts, explaining in mathematical terms how EPA's HAP standards "assur[e] that sources accounting

for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of” section 112. 42 U.S.C. § 7412(c)(6). The Notice did not set forth any construction of section 112(c)(6) that EPA had not already explained and relied upon in promulgating individual emission standards, and it is those standards that cumulatively discharged EPA’s legal obligations under section 112(c)(6). The Notice merely commemorated that fact. However, the Notice was not independently required by the CAA, and the policy choices underlying EPA’s achievement of the benchmark set out in section 112(c)(6) have been made in prior EPA actions relating to emission standards for particular source categories. As to those policy and regulatory aspects of section 112(c)(6), the Notice changed nothing, and thus is not a “statement of general or particular applicability and future effect *designed to implement, interpret, or prescribe law or policy.*” 5 U.S.C. § 551(4) (emphasis added).

Rather, the Notice is better considered an agency “order” – “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making,” 5 U.S.C. § 551(6) – since that is the APA’s definition of any agency action that is not the result of a rule making process. Even if it is a “rule,” the Notice at most constitutes an

“interpretative” rule (as opposed to a “legislative rule”), which like an order is exempt from the APA’s notice-and-comment requirements. 5 U.S.C.

§ 553(b)(1)(A). “The practical question inherent in the distinction between legislative and interpretive regulations is whether the new rule effects ‘a substantive regulatory change’ to the statutory or regulatory regime.” *Elec.*

Privacy Info. Ctr. v. DHS, 653 F.3d 1, 6-7 (D.C. Cir. 2011). The Notice did not do so; whether the requisite set of sources have been “subject to standards” sufficient to discharge EPA’s obligation under section 112(c)(6) depends on EPA’s promulgation of individual emission standards, not on whether EPA has documented the existence of those standards in a formal, but essentially ministerial, document.

Regardless, determining exactly what species of agency action the Notice might be should not be the focus of the Court’s inquiry; the categories of agency action established by the APA have “‘fuzzy perimeters,’” and the “legal characterization [of particular actions] cannot be accomplished merely by asking if a given agency action is one or another of such thing.” *Batterton v. Marshall*, 648 F.2d 694, 702-03 (D.C. Cir. 1980) (citation omitted). The central question here is whether the Notice had the *effect* of a legislative rule, and the answer to that question must be no where the Notice did not create any new policy or law. *Cf.*

City of Idaho Falls v. FERC, 629 F.3d 222, 227 (D.C. Cir. 2011) (“Whether characterized as an interpretive rule or just a procedural action, a notice doing no more than faithfully implementing established regulations does not require renewed notice and comment.”). The fact that the 90 Percent Notice memorializes EPA’s discharge of its obligations under section 112(c)(6) by tallying prior rulemakings for source categories already listed as needed to reach the required sum of 90 percent (a calculation that Sierra Club has not challenged), *see* Sierra Club Br. at 32, is irrelevant given that the legal and policy decisions that Sierra Club criticizes were made in the promulgation of individual emission standards for source categories listed under section 112(c)(6).

Furthermore, the Court’s analysis of whether agency actions constitute “rules” has, as a supplement to considering the substantive effect of the action, “focus[ed] on the underlying purposes of the procedural requirements at issue”: “to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,” to “give the public an opportunity to participate in the rule-making process,” and to “enable[] the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.” *Batterton*, 648 F.2d at 703-04 (footnotes and internal citations omitted). Analyzed

in light of these principles, the Notice is not a rule that needed to undergo notice and public comment. The Notice is merely an accounting of the numeric results of EPA's regulatory efforts, and EPA is not obligated under the APA to solicit public comment on the straightforward mathematical calculations it conducted in performing the mechanical, retrospective task of certifying compliance with the 90-percent requirements of sections 112(c)(3), (k)(3)(B), and (c)(6). Nor has Sierra Club suggested that it would have offered comments to show that EPA erred in its calculations.

Sierra Club's grievance clearly lies with the individual emission standards for sources listed under section 112(c)(6). However, such issues were not within the scope of EPA's task in issuing the Notice, the simple calculation of whether the source categories that it had already listed and subjected to MACT or health-based emission standards accounted for 90 percent of the baseline emissions of the section 112(c)(6) HAPs. Therefore Sierra Club's input would not have improved the Agency's performance of that task or provided useful information to EPA.

CONCLUSION

For the reasons above, the petition for review should be dismissed or denied.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief of Respondent EPA contains 12,362 words as counted by the Microsoft Word word processing system, and thus complies with the applicable word limitation.

/S/ Madeline Fleisher
Madeline Fleisher

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2012, the foregoing Brief of Respondent was served electronically through the Court's CM/ECF system on all registered counsel.

/S/ Madeline Fleisher
Madeline Fleisher